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No. 10-198

In The

# Supreme Court of the United States

JERRY LEE DONOVAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Where evidence has been seized by State law enforcement so as to bring that evidence within the jurisdiction and control of the State Court to determine the disposition of that evidence, does it violate the principles of federalism and comity for federal agents to seize or otherwise obtain that evidence for use in federal court without obtaining an order from the State Court authorizing such disposition of the evidence?

2. Where there is concrete, objective evidence, plus testimony from the accused, that he was subjected to an incriminating custodial interrogation prior to being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), does the government meet its burden to prove the lack of a deliberate two-step interrogation process when the only officer to testify at the evidentiary hearing was absent for two hours during the alleged interrogation and at trial two other officers testified to having questioned the accused during the alleged interrogation period and an audio recording or recordings and notes of such questioning were missing or lost?

3. Where there is substantial evidence that the accused was subjected to custodial interrogation during which he made incriminating statements prior to being advised of his *Miranda* rights, does the prosecution then need to demonstrate that the accused expressly, rather than implicitly, waived his *Miranda* rights?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Lee Donovan respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION AND JUDGMENT BELOW

The Court of Appeals' opinion, unofficially reported at 2010 WL 145141, is reprinted in the Appendix (App.) at App. 1-3. The related orders and rulings of the District Court are reprinted at App. 4-47.

## STATEMENT OF JURISDICTION

The District Court had jurisdiction under 18 U.S.C. §3231. The Court of Appeals issued its judgment on January 15, 2010. On March 25, 2010, the Court of Appeals denied Donovan's Petition for Panel Rehearing and Petition for Rehearing En Banc. On June 16, 2010, Justice Kennedy extended the time to file a petition for a writ of certiorari to and including August 9, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION, STATUTES, AND COURT RULE INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Alaska Statute 12.35.120 provides:

> **Definition of search warrant.** A search warrant is an order in writing, signed by a judge or magistrate or signed at the direction of a judicial officer in accordance with AS 12.35.015, directed to a peace officer, commanding the peace officer to search for personal property and bring it before the judge or magistrate.

Alaska Statute 12.36.010 provides:

> **Property disposition.** When property not belonging to a law enforcement agency comes into the custody of the agency, the property shall be disposed of in accordance with this chapter.

Alaska Rule of Criminal Procedure 37(c) provides:

> **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the

property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

## STATEMENT OF THE CASE

### Introduction

On December 8, 2004, the State of Alaska Court in Barrow issued search warrant No. 2BA-04-50 SW for the person of Jerry Donovan and the address of 1314 Kongek Street in Barrow, Alaska. App. 38. The warrant was executed commencing at approximately 8:20 that night, and the receipt and inventory of evidence seized was filed with the Barrow Court the next day, December 9, 2004. App. 13-14, 38.

Based upon the evidence seized, the State of Alaska on December 9, 2004 filed a Criminal Complaint charging Donovan with three felonies – one count of misconduct involving a controlled substance, methamphetamine (meth), and two counts of misconduct involving weapons. App. 38-39. Donovan appeared in court to answer the charges on December 9, 2004.

On December 20, 2004, the State's Assistant District Attorney advised the Barrow Court that the State was not intending to proceed with its case against Donovan. App. 39. Based on the State's decision to drop the case, the Barrow Court dismissed the State's Complaint. App. 39. Under Alaska Law, the State was then barred from prosecuting Donovan

further on the dismissed charges once 120 days had lapsed.[1]

On August 18, 2005, federal Drug Enforcement Administration (DEA) Agent Michael Foran took the search-warrant-seized controlled substances from the jurisdiction of the State of Alaska Court and sent that property to a DEA lab where it was then analyzed on or about September 30, 2005. App. 39. The weapons seized via the search warrant were similarly taken by federal agent Foran. App. 39.

In 2007, Donovan obtained substance-abuse treatment at the Salvation Army Clitheroe Center in Anchorage. While there, Donovan participated in a federal anti-meth campaign and translated a Native treatment program to make it cross cultural. Donovan's poster and accompanying life story appear as the 16th poster of 22 on the government's website at http://www.methresources.gov/pdfs/life_after_meth_22posters.pdf.

After the Clitheroe Center, Donovan returned to Barrow. Other than engaging in an alleged DUI in the aftermath of his father's suicide, Donovan successfully reintegrated himself back into the Barrow community. He prepared to start a machine shop and had the corresponding structure delivered to Barrow from the Lower 48. In addition, Donovan and his family decided to start a whaling crew, which Donovan would captain to harvest food for the needs of the Barrow community.

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[1] *See Alvarez v. Ketchikan Gateway Borough*, 91 P.3d 289, 293-94 (Alaska App. 2004).

**The Federal Court Proceedings**

On February 5, 2008, Donovan's plans came to a screeching halt when the government indicted him for the events of December 8, 2004 in Barrow. In response, Donovan filed two motions to suppress.

Donovan's first motion challenged the government's use of the meth and weapons evidence which was seized by local Barrow law enforcement under the search warrant and subsequently obtained by federal law enforcement without the State Court having released its jurisdiction over the evidence. After an evidentiary hearing, the District Court denied the motion. App. 32. The District Court denied the motion again when Donovan renewed it at trial. App. 7-9.

Donovan also moved to suppress his statements to the police. In his motion, Donovan asserted that he had been held at the residence, 1314 Kongek, for more than four hours while the police conducted their search. App. 16. Donovan also asserted that he was repeatedly interrogated by the several officers who took turns watching him. App. 16. He was subsequently taken across the street to the police station where he was first informed of his *Miranda* rights and was then interrogated again. *See* App. 16-17.

The interrogation of Donovan at the police station was recorded on video. App. 15, 17. On the video, Officer Datta of the North Slope Borough Police Department initially reads Donovan the *Miranda* advisement. Then, approximately 34 seconds into the

video, Officer Datta asks Donovan, "Do you understand your rights?" After Donovan then responds, "Yeh," Officer Datta immediately commences interrogating Donovan without obtaining any express waiver of Donovan's *Miranda* rights. App. 15, 17.

At approximately 1 minute and 9 seconds into the video, Officer Datta specifically refers to an earlier interrogation of Donovan: "And the crystal meth, you said that you helped out with cutting it up earlier." Thereafter, there are various discussions about the meth and the weapons over the next 40 minutes or so, during which Donovan admits to doing meth several hours earlier. In particular, however, commencing at approximately 3:42 of the video, Officer Datta states, "When I interview the people we have been observing going in and out of that place, how many of those people are going to tell me that you have been selling to them, I mean honestly." To this, Donovan responds, "I'd probably say all of them, probably." Officer Datta then states, "Probably all of them say," to which Donovan responds, "Probably, yes."

At the evidentiary hearing, the government's only witness was Officer Datta. App. 16 n.1. Datta testified that from the commencement of the search, Donovan was not free to go. App. 10-11, 14. Datta also testified that when serving the search warrant, he asked Donovan where the meth was in order to get Donovan to cooperate from the outset, to which end Datta purposely did not advise Donovan of his *Miranda* rights. App. 14. Thereafter, Datta interrogated the

other occupant of 1314 Kongek, Tok Kanayurak, and then left the premises with Kanayurak; Datta did not return to 1314 Kongek for two hours and thus was absent for half of the four hours Donovan was held there during the search. App. 11, 14. Datta recorded his interrogation of Kanayurak but did not recall whether other officers recorded the search proceedings.

After returning to the scene of the search, Officer Datta talked with Donovan again, but Datta did not recall the substance of such conversation, though Datta did recall asking Donovan where both the meth and the weapons were. Datta also did not recall other officers telling him that they had questioned Donovan or that the officers passed information to Datta that they gathered from Donovan. *See* App. 11, 15. Nor did Datta recall that portion of the interrogation where Datta referred to Donovan's pre-*Miranda* statement that Donovan had helped cut up the meth.

Officer Datta did recall that Officers Hope and Hamilton were also at 1314 Kongek during the search. Datta acknowledged that one of the officers would have watched Donovan while the other officers were searching, and that the officers may have taken turns, but that he, Datta, did not know what happened when he was gone from the premises. *See* App. 14-15.

The only other witness at the evidentiary hearing was Donovan. Donovan testified that he was searched right after the police arrived and that he was then kept in a cluttered, little tool room for most of the ensuing four hours. While Donovan was kept in the little room, Officers Hamilton and Gutierrez and

others asked him all types of questions about the weapons they found and about the meth, including about Donovan helping Kanayurak package the meth.

In the cluttered, little tool room, there was no place to sit; thus, Donovan was forced to lean against tables. When asked to be moved to the couch so he could sit down, the officers declined to do so until quite a while later when they wanted to move him so they could search the tool room.

By the time Donovan was finally taken to the police station, he was very tired. While Donovan had heard *Miranda* rights on TV, he had never been read the warning before; instead, the *Miranda* warnings meant nothing to him at the time and he did not understand them. Donovan felt that he was not given a chance to waive *Miranda* as the police immediately began interrogating him in a rerun of the questions that the officers had repeatedly asked him during the search. *See* App. 16.

In recommending that the District Court deny Donovan's motion, the magistrate, *inter alia*, concluded that Donovan's testimony concerning the repeated interrogations during the search and concerning the rerun of those interrogations during the police-station interrogation was not credible, even though no one refuted Donovan's testimony at the evidentiary hearing. App. 16. Donovan responded that because the government chose to call no witnesses (besides Officer Datta), the magistrate should infer that the

missing witnesses would have testified favorably to Donovan. The magistrate then affirmed his finding and concluded that Donovan was rightly held at 1314 Kongek during the execution of the warrant and thus brief questioning was permitted. *See* App. 10-12. The District Court then denied Donovan's motion. App. 4.

At trial, the questioning of Donovan during the search arose again. The government's first witness, Officer Degenhart, testified that other officers spoke with Donovan while watching him, that Officers Gutierrez, Hope, and Hamilton watched Donovan, that there were one or more audio recordings of the search made by Degenhart and other officers, and that Degenhart himself had made notes of the search events. *See* App. 28-29.

The government's second witness, Officer Hamilton, testified similarly. Officer Hamilton testified that he took over for Officer Gutierrez in watching Donovan. Officer Hamilton added that he had made an audio recording of the search but could not recall whether he still had a copy of the recording or not. *See* App. 28-29.

Shortly thereafter, Donovan renewed his *Miranda* motion based upon the testimony of Officers Degenhart and Hamilton; Donovan added that the District Court should presume that the missing recordings and notes were favorable to Donovan. App. 28-29. The District Court denied the motion and noted that the issues were preserved for appeal. App. 29.

At trial, the government argued that Donovan's statements on the interrogation video demonstrated that he – not Kanayurak – was "the dealer in the house." The jurors then viewed the interrogation video again, after which they convicted Donovan.

On appeal to the Ninth Circuit Court of Appeals, Donovan raised the arguments he had made previously in the District Court. The Ninth Circuit affirmed in the opinion set forth at App. 1-3.

## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION CONCERNING THE RELATIONSHIP BETWEEN STATE COURTS AND STATE AGENTS ON ONE HAND, AND FEDERAL AGENTS AND FEDERAL COURTS ON THE OTHER, WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. IN ADDITION, THE NINTH CIRCUIT COURT OF APPEALS' DECISION OF THAT QUESTION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Under Alaska law, when evidence is seized by State or municipal law-enforcement personnel, that evidence is within the exclusive jurisdiction of the Alaska State Court to control the disposition of the

evidence.[2] This is the case regardless of whether the evidence is seized under a search warrant or is otherwise obtained by the State or municipal law-enforcement agency.[3] As such, Alaska law is akin to Oregon law in vesting in its State Courts exclusive control of and discretion over items seized by law enforcement.[4]

The Court of Appeals characterizes the case as concerning sovereignty-inoffensive "[c]ooperation and evidence sharing between state and federal agencies." App. 2. However, the overarching question which the Court of Appeals overlooked is whether the disposition of that evidence by transferring it from State law-enforcement personnel to federal law-enforcement personnel without an order from the State Court authorizing such disposition violates principles of federalism and comity, and thus is *not*

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[2] *See Johnson v. Johnson*, 849 P.2d 1361, 1364 (Alaska 1993).

[3] *See* Alaska Criminal Rule 37(c); AS 12.35.120 (definition of a search warrant); AS 12.36.010 ("When property not belonging to a law enforcement agency comes into the custody of the agency, the property shall be disposed of in accordance with this chapter."); *see also State v. Murtaugh*, 169 P.3d 602, 609 (Alaska 2007) (discussing the constitutional obligation of Alaska's courts to police the actions of law enforcement).

[4] *See United States v. Kama*, 394 F.3d 1236, 1240-41 (9th Cir. 2005) (Ferguson, J., concurring specially).

"in compliance with federal law."[5] Correspondingly, the evidence is inadmissible in federal court.[6]

This Court in *Penn General Casualty Co.* was concerned with "avoid[ing] unseemly and disastrous conflicts in the administration of our dual judicial system" and with "protect[ing] the judicial processes of the court first assuming jurisdiction."[7] Toward those ends, the Court articulated that "the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."[8]

Nor did the *Penn General* Court limit its holding to forfeiture cases and other situations involving concurrent jurisdiction of property:

> If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property pendente lite, the

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[5] *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1988).

[6] *Id.*

[7] *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935) (brackets added).

[8] *Id.*

> time of acquiring actual possession may perhaps be the decisive factor.[9]

As Chief Judge Patel has observed:

> The conflict hardly seems less disastrous or unseemly, or the state judicial process more respected, because the federal court has stripped the state court of jurisdiction in service of an *in personam* action, rather than an *in rem* one. The lesson of *Penn General* is clearly that federal courts may not interfere with state court *in rem* jurisdiction by forcibly taking possession of the *res*. Under this principle, issuance of a search warrant is no less forbidden than commencement of a forfeiture action.[10]

From the federalism perspective, the "cooperation and evidence sharing" condoned by the Court of Appeals is devastating and disastrous as, under the guise of cooperation, federal agents cause or encourage disregard of State law and disrespect of the jurisdiction of the State Court. By failing to obtain sovereign consent via a properly-obtained judicial turnover order, the federal government tramples the jurisdiction of the Alaska State Courts.[11] In essence, the actions of the federal agents in this

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[9] *Id.* at 196.

[10] *In re Seizure of Approximately 28 Grams of Marijuana*, 278 F.Supp.2d 1097, 1108 (N.D. Cal. 2003); *see also Kama*, 394 F.3d at 1240-41 (Ferguson, J., concurring specially).

[11] *See Printz v. United States*, 521 U.S. 898, 918-35 (1997).

case have obliterated the fundamental authority of State Courts to control State officers and property subject to State Court jurisdiction; thus, State officers would violate their duties with impunity as long as they are encouraged or commanded by a federal hand.[12]

"The Constitution [instead] contemplates that a State's government will represent and remain accountable to its own citizens."[13] In other words, in the unprecedented framework of our federalism, there is the "double security"[14] of "two orders of government, each with its own direct relationship, its own priority, its own set of initial rights and obligations to the people who sustain it and are governed by it."[15] How then can States be independent and autonomous within their own spheres, as well as accountable to their own citizens, if they cannot control the actions of their own law enforcement, especially when their law enforcement engage in rogue acts pressured by the request of federal agents?[16] Where, as here, the federal actions offend the very principles of separate State sovereignty, "no

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[12] *See id.* at 905-11.

[13] *Id.* at 920 (brackets added).

[14] *Id.* at 922 (quoting The Federalist No. 51, at 323 (C. Rossiter ed. 1961)).

[15] *Printz*, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

[16] *Cf. Printz*, 521 U.S. at 920-28.

comparative assessment of the various interests can overcome that fundamental defect."[17]

In sum, State law-enforcement personnel and federal law-enforcement personnel may certainly choose to share evidence and otherwise work in cooperation; however, any cooperation between the two is subject to constitutional constraints. One such constraint is that when State law enforcement seizes evidence which is then within the jurisdiction and control of the State Court, the federal law enforcement must respect the State Court's jurisdiction and thus may properly obtain that evidence from State law enforcement only when the State Court has authorized such transfer. That is federalism at its finest.

## II. THE NINTH CIRCUIT COURT OF APPEALS HAS DETERMINED OR APPLIED THE GOVERNMENT'S BURDEN TO PROVE THE NON-DELIBERATENESS OF WITHHOLDING *MIRANDA* WARNINGS IN SUCH A WAY SO AS TO CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND OF THIS COURT.

In *Missouri v. Seibert*, this Court delineated the inquiry to be made where incriminating statements have been obtained by a two-step interrogation

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[17] *Id.* at 932.

process in which *Miranda* warnings were first provided only after the accused had made incriminating statements during a custodial interrogation.[18] Under *Seibert*, if a "deliberate two-step strategy" was employed by the police, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."[19] While Justice Kennedy's concurrence thus established the deliberateness standard, *Siebert* "did not address the burden of proof or standard of review applicable to the determination of deliberateness."[20]

Because the government bears the burden of proving by a preponderance of the evidence that the accused validly waived the *Miranda* protections and that any confession was voluntarily given,[21] at least two United States Courts of Appeals have held that "the government bears the burden of proving the police did *not* deliberately withhold the warnings until after they had an initial inculpatory statement in

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[18] *See Missouri v. Seibert*, 542 U.S. 600, 604, 608-17 (2004) (plurality opinion); *id.* at 617-18 (Breyer, J., concurring); *id.* at 618-22 (Kennedy, J., concurring in the judgment).

[19] *Id.* at 622 (Kennedy, J., concurring in the judgment).

[20] *United States v. Stewart*, 536 F.3d 714, 719 (7th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 741 (2008).

[21] *See Seibert*, 542 U.S. at 608 n.1.

hand."[22] The government must meet this burden in view of the totality of the particular facts and circumstances surrounding the interrogations, and reviewing courts will scrutinize the District Court's findings accordingly.[23]

In Donovan's case, there are many hallmarks of deliberateness, including the testimony of Officer Datta that he purposely did not advise Donovan of his *Miranda* rights so as to better obtain Donovan's cooperation, the lengthy period of detention during the search, the lack of any break as Donovan was transported directly to the police station across the street, and the overlap between the two interrogations.[24] Officer Datta's express reference on the video to Donovan's earlier incriminating statement about packaging the meth is particularly troubling, as Justice Kennedy observed in *Seibert*:

> Reference to the prewarning statement was an implicit suggestion that the mere repetition

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[22] *Stewart*, 536 F.3d at 719 (emphasis in original); *see also United States v. Ollie*, 442 F.3d 1135, 1142-43 (8th Cir. 2006); *cf. United States v. Phipps*, 290 Fed. Appx. 38, 39 (9th Cir. 2008) (noting but not deciding the burden-of-proof issue).

[23] *See Moran v. Burbine*, 475 U.S. 412, 421 (1986); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979); *Stewart*, 536 F.3d at 719-20.

[24] *See Seibert*, 542 U.S. at 615-17; *id.* at 620-21 (Kennedy, J., concurring in the judgment); *Stewart*, 536 F.3d at 720-22.

> of the earlier statement was not independently incriminating. The implicit suggestion was false.[25]

Moreover, how can the government meet its burden to demonstrate a lack of deliberateness in view of the totality of the particular facts and circumstances when the government at the evidentiary hearing produced only Officer Datta – who was absent for two hours of the period at issue – and then at trial other officers testified to questioning Donovan during Datta's absence and to having made notes and a recording or recordings, all of which have apparently been lost or destroyed by the police?[26] At a minimum, it must be presumed that the missing witnesses, notes, and recordings would demonstrate a deliberate two-step interrogation process.[27]

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[25] *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment).

[26] *See Moran*, 475 U.S. at 421; *Butler*, 441 U.S. at 374-75; *cf. Phipps*, 290 Fed. Appx. at 38 39 (positing the burden of proof problem that arises where there is an evidentiary vacuum or gap in relation to the deliberateness issue).

[27] *See Graves v. United States*, 150 U.S. 118, 121 (1893); *United States v. Kojayan*, 8 F.3d 1315, 1317 (9th Cir. 1993); *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Schmidt v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 78 (3rd Cir. 1994); *Nation-Wide Check Corporation, Inc. v. Forrest Hill Distributors, Inc.*, 692 F.2d 214, 217-18 (1st Cir. 1982) (Breyer, J.).

## III. THE NINTH CIRCUIT COURT OF APPEALS HAS DETERMINED AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER AN EXPRESS WAIVER OF *MIRANDA* RIGHTS IS REQUIRED WHEN THERE IS CONCRETE EVIDENCE THAT THE ACCUSED WAS SUBJECTED TO CUSTODIAL INTERROGATION WHICH PRODUCED INCRIMINATING STATEMENTS BEFORE HE WAS ADVISED OF HIS *MIRANDA* RIGHTS.

In *Berghuis v. Thompkins*, this Court recently held that the prosecution ordinarily does not need to establish an express waiver of *Miranda* rights; rather, an implicit waiver will suffice where there is no basis to conclude that the accused did not understand his rights.[28] In contrast to *Thompkins*, in Donovan's case he was subjected to a two-step interrogation process which, even if not deliberate within the meaning of *Seibert*, involved the police expressly referring to incriminating statements Donovan had made previously that night while in police custody but prior to receiving *Miranda* warnings. In addition, Donovan himself testified to being confused by the jail-house interrogation as a repeat of the previous four hours where he was interrogated by multiple officers while being held in his home. In circumstances such as

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[28] *See Berghuis v. Thompkins*, ___ U.S. ___, ___, 130 S.Ct. 2250, 2261-62 (2010).

Donovan's, the Court should require an express waiver of *Miranda* rights.[29]

## CONCLUSION

For the reasons stated, the Court should grant the Petition for Writ of Certiorari. Jerry Lee Donovan respectfully prays that the Court so order.

Respectfully submitted,

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[29] *See Thompkins*, ___ U.S. at ___, 130 S.Ct. at 2261-62; *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment).

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>JERRY LEE DONOVAN,<br>Defendant-Appellant. | No. 09-30003<br>D.C. No. 4:08-cr-00002-RRB-1<br>MEMORANDUM*<br>(Filed Jan. 15, 2010) |

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, Chief District Judge,
Presiding

Submitted January 13, 2010**
Seattle, Washington

Before: KLEINFELD and TALLMAN, Circuit Judges, and SETTLE,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

The parties are familiar with the facts and arguments in the case so we do not repeat them here. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Donovan bases his evidentiary argument primarily on Alaska forfeiture law and principles of state sovereignty. However, "evidence seized in compliance with federal law is admissible without regard to state law." *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1988) (citation omitted). Cooperation and evidence sharing between state and federal agencies does not violate principles of state sovereignty.

Regarding the motion to suppress Donovan's inculpatory statements, the district court's factual finding after conducting an evidentiary hearing that Donovan's testimony was not credible and its ruling that he was not subject to a two-step interrogation were not illogical, implausible, or without support in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (citation omitted).

Finally, we hold that Donovan's waiver of his *Miranda* rights was knowing, intelligent, and voluntary. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). Following proper *Miranda* warnings, Donovan acknowledged he understood the warnings and then answered Sergeant Datta's questions, while remaining relaxed and appearing coherent and rational. This is sufficient to constitute an implied

waiver as long as that waiver was knowing, intelligent, and voluntary. *See United States v. Rodriguez-Preciado,* 399 F.3d 1118, 1127, *amended on other grounds,* 416 F.3d 939 (9th Cir. 2005) (citations omitted). The district court held that "Donovan's age, experience and background corroborate the court's assessment that he had the capacity to under[stand] the warnings given him and to exercise those rights decidedly." In light of the record, the district court's finding that Donovan understood his rights is not illogical, implausible, or unsupported. *See Hinkson,* 585 F.3d at 1262. The record likewise demonstrates, by a preponderance of the evidence, that Donovan's waiver and subsequent statements were voluntary and were not the product of government coercion, *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986) (citations omitted).

**AFFIRMED.**

**U.S. District Court**

**District of Alaska**

**Notice of Electronic Filing**

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**Case Name:** USA v. Donovan
**Case Number:** 4:08-cr-2
**Filer:**
**Document Number:** 91(No document attached)

**Docket Text:**
**MINUTE ORDER: Before the Court is Defendant with a Motion to Suppress Statements at Docket 33. The Court has reviewed all of the relevant pleadings, including the Initial Recommendation of the Magistrate Judge at Docket 79, objections thereto, and the Final Recommendation at Docket 90. Based thereon, the Court hereby ACCEPTS and ADOPTS the Magistrate Judge's recommendations and DENIES Defendant's Motion to Suppress. The Court concludes the Defendant validly waived his Miranda rights; the police officers did not intentionally employ a two-step process in their interrogation of Defendant; and Defendant's statements were voluntary. (JPS, COURT STAFF)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>JERRY LEE DONOVAN,<br>Defendant. | Case 4:08-cr-00002-RRB<br>Fairbanks, Alaska<br>Monday, July 14, 2008<br>8:32 o'clock a.m.<br>**TRIAL BY JURY – 1ST DAY** |

**VOLUME 1**

**PARTIAL TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE
RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Transcription Service: A & T Transcripts
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[1-15] THE COURT: Is Alaska Native.

MR. GAZEWOOD: Yeah.

THE COURT: Okay. I'll ask if there's anyone who's lived in Barrow. You just have to take note of that. Okay, anything else we need to be concerned about? I have standard – when I ask them – at some point I ask them if they can be fair and follow the judge's instructions. And I just give an example. For instance, I say, the defendant has a right not to testify, and you'll be instructed you can't hold that against him; anyone who can't follow that instruction. That's the way I've raised it. I just – for example, the defendant is presumed innocent; anyone who can't follow that instruction. That's the way I

kind of get to that area. Okay. Mr. John, do you have anything – you look like you're pensive.

MR. JOHN: One thing I just wanted to make sure, Your Honor. We filed that motion about suppressing the evidence obtained from the state court through the search warrant, just to make clear that that applies to all the evidence that has been obtained that way. There's been stuff that just came in from the North Slope Borough Police Department recently we were looking at last week. But that would be within the scope of our motion as to –

THE COURT: So the government – the search warrant wouldn't come up other than just in a casual statement at the beginning, you know, we had a search – you – did you obtain [1-16] the search warrant; yes, we did; and then based on that search warrant, what did you do. That's – it won't be –

MR. SCHRODER: That's correct.

THE COURT: – more specific than that, will it?

MR. SCHRODER: No.

THE COURT: Is – did you have something more specific you were concerned about?

MR. JOHN: Well, I just want to make sure that our motions covers, because our objections were to any evidence obtained by the state search warrant being used in this proceeding.

THE COURT: Okay. But I thought your motion was denied.

MR. JOHN: Right, right. But I just wanted to make sure that it covers all the evidence, because there was evidence – we originally were talking primarily about the meth and the guns, but if there's a whole bunch of other evidence that was seized by the search warrant, that the same concept applies to, that we – our position was that they should have got the permission –

THE COURT: Oh, you're saying just for the record –

MR. JOHN: – (indiscernible) court –

THE COURT: – just – oh –

MR. JOHN: – yeah, for the record.

THE COURT: Oh, okay. You just want to make sure your [1-17] record's clear. Okay.

MR. JOHN: Yes.

THE COURT: You're not making – wanting me to think again about this subject.

MR. JOHN: No, Your Honor. I just want to –

THE COURT: Okay.

MR. JOHN: – make sure you get –

THE COURT: Okay, this is early in the morning. Okay, your record looks pretty clean to me.

MR. JOHN: Okay.

THE COURT: I read all those motions. Did a good job, laid it out clear. Anything about that from the government's perspective?

MR. SCHRODER: No, Your Honor, but we did have one other thing we –

THE COURT: Okay.

MR. SCHRODER: – just thought of.

THE COURT: All right.

MR. SCHRODER: As far as voir dire's concerned, I know we've asked in our voir dire questions – and I think the Court's given this kind of – used this kind of question in the past about whether people have broad objections to firearms laws.

THE COURT: Yes. Yeah.

MR. SCHRODER: Our – even though we're bifurcating,

* * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

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| UNITED STATES OF AMERICA<br>Plaintiff,<br>vs.<br>JERRY LEE DONOVAN,<br>Defendant. | 4:08-cr-002-RRB-JDR<br>**FINAL RECOMMENDATION REGARDING MOTION TO SUPPRESS**<br>(Filed Jul. 10, 2008)<br>(Docket No. 33) |

Defendant **Jerry Lee Donovan** has timely filed objections to the Recommendation regarding his motion to suppress. Docket No. 87. The government filed a response, Docket No. 32. Upon due consideration of the objections the magistrate judge continues to recommend that the motion to suppress statements be denied. A few comments regarding the objections are in order.

Donovan argues in his objections that he was held at the residence at 1314 Kongek Street so that he could answer questions regarding the meth and meth related items the officers were searching for. Donovan's initial detention was justified because of his presence during the execution of the warrant for officer safety and to prevent flight in the event that incriminating evidence was found. *See United States v. Davis,* ___ F.3d ___ (9th Cir. May 5, 2008, WL 2574510). Under *Davis* the officers were not required to give *Miranda* warnings to Donovan whose

detention was incident to the execution of the search warrant as long as the questioning stayed within the bounds of those permitted during a *Terry*[1] stop. Sargent [sic] Datta chose to interview Tok Kanayurak first because Donovan was the focus of his attention and the officer reasoned that Kanayurak might be able to provide information that would be helpful when the officer did interview Jerry Donovan. Transcript of Evidentiary Hearing (hereinafter Tr.), p.9. Once the guns and drugs were found Donovan was brought to the police station and interviewed. Tr. 12.

Although the officers were at the residence for about four hours Sargent [sic] Datta was gone for about two hours of that time. Tr. 22.

Donovan disagrees with the court's finding that to Sargent [sic] Datta's knowledge the officers at the house did not ask Donovan any specific questions about the investigation(s) contrary to the evidence. Sargent [sic] Datta was asked on cross-examination whether Sargent [sic] Degenhardt or any other officer communicated to him, Sargent [sic] Datta, statements attributed to Donovan at the residence. Tr. 25. Sargent [sic] Datta responded "Not that I recall . . . I don't recall anybody saying that they had because that's why I read him his *Miranda* rights when I got to the station. So not that I specifically recall or not, but I don't think so." Tr. 25. Sargent [sic] Datta

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[1] *Terry v. Ohio*, 292 U.S. 1 (1968).

concluded that Donovan had not been interviewed at the residence because he had not been read his *Miranda* rights.

The remainder of the topics objected to have been adequately addressed in the recommendation. The conclusions in the recommendation that Donovan validly waived his *Miranda* rights, that the officers did not deliberately employ a process to bypass the *Miranda* rights, and that Donovan's statements at the police station were made voluntarily, knowingly and intelligently are hereby reaffirmed. Accordingly, the court should follow the recommendation denying the motion to suppress statements. The motion and related pleadings shall now be forwarded to the assigned district judge for his determination.

DATED this 10th day of July, 2008, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

# UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| UNITED STATES OF AMERICA<br>Plaintiff,<br>vs.<br>JERRY LEE DONOVAN,<br>Defendant. | 4:08-cr-002-RRB-JDR<br>**RECOMMENDATION REGARDING MOTION TO SUPPRESS**<br>(Filed Jul. 8, 2008)<br>(Docket No. 33) |

Defendant **Jerry Lee Donovan** moves to suppress statements he made to the police on the night of December 8-9, 2004. He argues that his statements were not voluntary and the product of a custodial investigation without a valid waiver of *Miranda* rights. Docket No. 33. The motion is opposed by the government. Docket No. 49. An evidentiary hearing was conducted on June 19, 2008. Upon due consideration of the evidence adduced and the arguments of counsel ***the magistrate judge recommends that the motion to suppress statements be denied***. It is further recommended that the court adopt findings of fact and conclusions of law as set forth below.

## Findings of Fact

On December 8, 2004 law enforcement officers served a search warrant on a residence reputed to be that of Jerry Donovan located at 1314 Kongek Street

in Barrow, Alaska. The warrant was issued by the Alaska State Court at Barrow based upon an application by John Datta, North Slope Borough Police Department, assigned to the Village Unit in Prudhoe Bay, Sgt. Datta had received information from several sources that Donovan was selling crystal meth. Tok Kanayurak had also been seen coming out of that residence. The search warrant was served about 8:20 p.m.

Jerry Donovan and Tok Kanayurak were in the house at the time the warrant was served. After the residence was secured by the officers, Sgt. Datta interviewed Kanayurak. He then escorted Kanayurak from the residence and was gone for a couple of hours before returning to the residence.

Soon after the entry into the residence Sgt. Datta had a conversation with Donovan to show him the warrant and explain why they were there and what items they were looking for. He sought Donovan's cooperation and invited him to point at where items might be to avoid the officers' disrupt of the house by looking for the items. Donovan provided no information about the location of any items sought.

At the residence several officers took turns watching Donovan while other officers conducted the search. The search of the residence revealed several guns, a bag containing what was believed to be crystal meth, a bag containing multiple small bags and a couple of scales. There were also notes containing initials believed to be people's names that

owed money. A pistol appeared to be similar to one that had been reported stolen. A field test with a NIK kit showed a positive presumption for crystal meth.

To Sgt. Datta's knowledge the officers at the house did not ask Donovan any specific questions about the investigation. No other officers indicated to Sgt. Datta that they had conducted an interview with Donovan at the residence while the Sargent [sic] was away from the premises. Donovan was taken to the police station after the guns and drugs had been found. The only time he was placed in handcuffs was when he was transported to the police station. At the station Donovan was placed in a squad room equipped with a video camera and then interrogated.

At the beginning of the interrogation Donovan was advised of his *Miranda* rights. He was advised: you have the right to remain silent; anything you say can and may be used against you in a court of law, you have the right to talk to a lawyer and have him present. If you can't afford one, one can be appointed for you by a court of law. You can decide at any time to exercise your rights to not talk.

Donovan was asked if he understood his rights and he indicated that he did. No explicit waiver of the *Miranda* rights was sought. Sgt. Datta concluded that Donovan offered no resistance to talking. At no time did Donovan ask for a lawyer During the interrogation Donovan was tired but allowed to drink coffee. In Sgt. Datta's experience persons who had taken methamphetamine four hours or more prior to

the interview were able to understand and coherently participate in the conversation. No coercion was used directly or indirectly to cause Donovan to answer questions. During the interrogation Donovan was "laid back."

According to Donovan's testimony he had come to 1314 Kongek Street solely to pick up his stuff because he had moved to Anchorage. He claims that the officers asked him not only where the drugs and guns were located but where they had come from. He testified that the officers at the house asked him the same questions over and over again trying to get him to confess.[1] I find this testimony not credible. When asked about the drugs he told the officers he did not know where they had come from. When asked about the firearms he told them "Tok told me they were hot."

Donovan testified that his interrogation at the police station was "another rerun of the all the questions" that he had been asked at the house. I find this statement not credible. Donovan claims that he did not fully understand his *Miranda* rights. What he meant by "fully understand" is not explained in the testimony. Donovan asked no questions about his *Miranda* rights nor did he seek clarification of what was said to him by Sgt. Datta.

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[1] Only Sgt. Datta and Jerry Donovan testified at the suppression hearing.

**Conclusions of Law**

It is undisputed that Donovan was not advised of his *Miranda* rights until after he was taken to the police station during the late evening and early morning hours of December 8 and 9, 2004. At the police station, Donovan was advised of his *Miranda* rights and asked if he understood them. He replied: "Yes." Then Sgt. Datta proceeded to ask Donovan questions without inquiring whether he was willing to waive the *Miranda* rights and talk with the officers.

Sergeant Datta began his interrogation by stating "You kinda know about the trouble that you're in. You know what I'm staying?" When Sgt. Datta paused for a response Donovan made no reply. The DVD (Plaintiff's Exhibit 1) does not show any perceivable body movement that would signify that he was answering the question.

In order for inculpatory statements made by a defendant during custodial interrogation to be admissible in evidence at trial the defendant's waiver of his *Miranda* rights must be voluntary, knowing, and intelligent. *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985) citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). A valid waiver of *Miranda* rights is determined upon an assessment of the "totality of the circumstances including the background, experience, and conduct of the defendant. *United States v. Bernard S*, 795 F.2d 749, 751 (9th Cir. 1986). The law presumes waiver was not given. *Id.* at 752; *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). The

government bears the burden of proving by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

In assessing the totality of the circumstances the court considers whether the defendant was aware of the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The court must indulge every reasonable presumption against waiver of a fundamental constitutional right. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Johnson v. Zerst*, 304 U.S. 458, 464 (1938). The government must prove an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst, supra* or at 464.

Neither a written nor an oral expressed waiver is required; however, implied waivers are clearly disfavored. *United States v. Hernandez*, 574 F.2d 1362, 1371 ([5]th Cir. 1978). *See* also *Estelle v. Williams*, 425 U.S. 501, 515 (1975); *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972). A valid waiver is not presumed simply from the fact that a confession was in fact eventually obtained. *Miranda supra*, at 475.

Under *Miranda* the police have no right to question a suspect prior providing him with the *Miranda* warnings and obtaining a waiver. 384 U.S. at 471. From the record I determine that Donovan understood his *Miranda* rights. There is no issue about the adequacy of those rights stated by the officer. The

Ninth Circuit recognizes that waivers of *Miranda* rights need not be expressed. "[A] suspect may impliedly waive the rights by answering an officer's questions after receiving *Miranda* warnings." *United States v. Rodriguez, supra* at 1080, citing *United States v. Rodriguez-Preciado,* 399 F.3d 1118, 1127, amended 416 F.3d 939 (9th Cir. 2005).

*North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755 (1979) holds that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived his right to remain silent or the right to consult counsel. That the defendant had an understanding of his rights still leaves the question of whether he intended to waive them. The issue is not one of form of waiver but rather whether the defendant did in fact knowingly and voluntarily waive his *Miranda* rights. To answer this question the court conducts an assessment of the police conduct as well as the defendant's words and actions to see if he did in fact waive his rights.

Donovan was adequately and effectively apprised of his constitutional rights by the advisement given to him by Sgt. Datta. When interrogating questions began at the police station, Donovan remained relaxed and appeared capable of listening to the questions asked and formulating a coherent rational response. The officer's questioning was conversational and not overbearing or threatening. At no time did Donovan ask for clarification of a question or appear hesitant to provide response. He did not ask for an attorney nor offer any complaints about being interrogated at

that hour of the night. His responses were made voluntarily without any inducement.

Alaska law provides that it is not necessary for the officer to explain the benefits of counsel to him in order to obtain a valid waiver. *Vail v. State*, 599 P.2d 1371, 1378-79 (Alaska, 1979). Donovan expressed a willingness to talk, although in a guarded fashion so as not to volunteer information. Donovan's age, experience and background corroborate the court's assessment that he had the capacity to under[stand] the warnings given him and to exercise those rights decidedly. Donovan had previously been arrested on numerous occasions including felonies. Donovan appeared to be emotionally stable and capable of effectively waiving his rights. I conclude that he was not under the influence of alcohol or narcotics that would have rendered him unable to provide a valid waiver of his rights.

**II.** [sic]

Next, Donovan argues that the police deliberately elicited incriminating statements from him before giving a *Miranda* warning and obtaining a confession from him after the *Miranda* warnings were administered. Courts have recognized that a defendant's post-*Miranda* statements may be inadmissible if law enforcement officers engage in a two-step interrogation process that involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting

a repeated confession. *See Missouri v. Seibert,* 542 U.S. 600, 617 (2000).

Where this tactic is employed the interrogators must take curative measures to apprise the defendant of his rights to avoid having the statement suppressed. If the two-step method is not deliberate the post-warning statements may be admissible if they are made voluntarily. *Id.* at 622. Thus, the court must first make a factual finding on the deliberateness issue.

The Ninth Circuit instructs that deliberateness may be found if "objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda.* warning." *United States v. Narvaez-Gomez,* 489 F.3d 970 974 (9th Cir. 2007). In this regard objective evidence includes the timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements. *Id.* citing *United States v. Williams,* 435 F.3d 1148, 1159 (9th Cir. 2006).

After considering the objective and subjective evidence of deliberateness I conclude that the officers did not employ a two-step interrogation. Donovan's initial detention at the residence was based upon his presence there when the officers arrived to execute the search warrant. In the typical investigation officers will inquire from those present whether they

choose to disclose the location of some of the evidentiary items being sought. Depending upon the nature of the response by the individual his statements could be incriminating with regard to knowledge of the presence of contraband. Donovan denied knowledge of the location of any drugs in the residence during the first inquiry. Here the officers sought in good faith to solicit cooperation not a confession.

Donovan argues that the police repeatedly questioned him about "the full panoply of evidence obtained during the execution of the search warrant." Docket No. 33, p. 5-6. Sgt. Datta did not remember asking any specific incriminating question of Donovan at the Kongek Street house. Nor had any other officers told Sgt. Datta they had conducted an interview with Donovan at the residence. Donovan acknowledged during cross-examination at the evidentiary hearing that he did not incriminate himself when questioned inside the residence.

The meth seized at the premises was field tested positive for the presumptive presence of methamphetamine. Thereafter, Donovan was placed under arrest and transported to the police station. At the police station he was taken to a room for questioning about 1:40 a.m. on December 9, 2004. In response to an inquiry Donovan told Sgt. Datta that he had not been previously read his *Miranda* rights.

When Sgt. Datta asked Donovan if the officers had found all of the drugs at the residence, Donovan

responded that there were two baggies of the drug. The officers had found only one bag. At no time did Donovan respond to any of Sgt. Datta's questions at the police station by stating that he had earlier made a response to a similar question.

The government argues that a deliberate two-step interrogation process was not used by the police officers. The earlier questioning occurred at the residence about four hours before the interrogation occurred at the police station.

This initial questioning addressed whether Donovan knew the location of any of the items sought by the search warrant. He denied such knowledge. There is no credible evidence that other interrogating questions were asked.

Sgt. Datta who conducted the police station interrogation did not know whether Donovan had been mirandized before being brought to the police station. The Sgt. had information about Donovan's repeated involvement in selling meth learned prior to the execution of the search warrant. Because this was all part of a criminal investigation it is not surprising that the colloquy about the search warrant and the interrogation at the police station related to the guns and drugs.

For the foregoing reasons I conclude that Donovan understood what was happening during his questioning at the police station and that his responses to questions asked were made freely, voluntarily and without coercion by the police. Upon comparing the

two interviews I conclude by a preponderance of the evidence that the police did not impermissibly employ a two-step procedure in asking Donovan questions. Wherefore, the motion to suppress statements made at the police station should be denied. IT IS SO RECOMMENDED.

DATED this 1st day of July, 2008, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

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Pursuant to D.Ak.L.M.R. 6(a), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than **4:00 p.m., Wednesday, July 9, 2008**. Failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. *McCall v. Andrus,* 628 F.2d 1185, 1187-1189 (9th Cir.), *cert. denied,* 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation *United States v. Howell,* 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected

to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **3:00 p.m., Thursday, July 10, 2008**. The parties shall otherwise comply with provision: of D.Ak.L.M.R. 6(a).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. *See Hilliard v. Kincheloe*, 796 F.2d 308 (9th Cir. 1986).

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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| UNITED STATES OF AMERICA, Plaintiff, vs. JERRY LEE DONOVAN, Defendant. | Case 4:08-cr-00002-RRB<br>Fairbanks, Alaska<br>Tuesday, July 15, 2008<br>9:03 o'clock a.m.<br>**TRIAL BY JURY – 2ND DAY** |

**VOLUME 2**

**TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE RALPH R. BEISTLINE UNITED STATES DISTRICT JUDGE

APPEARANCES:

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| | |
|---|---|
| | ROBERT JOHN, ESQ.<br>Law Office of Robert John<br>Box 73570<br>Fairbanks, Alaska 99707<br>(907) 456-6056 |
| Court Recorder: | LYNN GROVES KELLEY<br>U.S. District Court<br>101 12th Avenue, Room 332<br>Fairbanks, Alaska 99701<br>(907) 451-5792 |
| Transcription Service: | A & T Transcripts<br>2517 Shady Ridge Drive<br>Bedford, Texas 76021<br>(817) 685-7556 |

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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[2-191] MR. JOHN: Right, we know what's coming.

THE COURT: Okay. What's your response? Anything?

MR. JOHN: Well, we had some completeness problems, but we've –

THE COURT: You resolved them?

MR. JOHN: We've – have resolved that, but –

MR. SCHRODER: We're going to play a little bit more of the tape –

THE COURT: Okay.

MR. SCHRODER: – to meet their needs, so

THE COURT: Very well.

MR. JOHN: Okay.

THE COURT: Let's bring the jury in.

MR. JOHN: And –

MR. SCHRODER: We're ready to go.

MR. JOHN: – well, Your Honor, I guess I want to just renew our *Miranda* motion, our two-step motion –

THE COURT: *Miranda* motion.

MR. JOHN: The two-step motion we had made –

THE COURT: Oh, my goodness.

MR. JOHN: – based upon the subsequent testimony we've heard here from the officers who indicate they did talk with Mr. Donovan, they all discussed that. And I'd also like to bring up the fact that the missing recording and the missing notes here, and those –

|2-192| THE COURT: Okay.

MR. JOHN: – things should be presumed to be favorable to Mr. Donovan's side of the story. So when you weigh that all (indiscernible) – I believe we do have a two-step –

THE COURT: His side of the story – what side of the story do you mean?

MR. JOHN: Mr. Donovan testified at the hearing basically to the fact that he was interrogated by multiple officers.

THE COURT: Okay,

MR. JOHN: The officers have indicated that several officers watched him. They talked about having spoken with Mr. Donovan. We have the issue of the missing notes of Sergeant Degenhardt. And we also have the missing tape from Officer Hamilton as well.

THE COURT: Okay.

MR. JOHN: And –

THE COURT: What's the government's response to all that?

MR. SCHRODER: That motion's been decided, Your Honor. I don't think we have anything missing that I'm aware of.

THE COURT: Okay. Well, I think that Mr. John's just doing a great job in making his record –

MR. SCHRODER: Yes, sir.

THE COURT: – and he's got the issues preserved on [2-193] appeal. So let's keep going.

MR. SCHRODER: Uh-huh (affirmative). We're ready.

THE COURT: I'm ready.

(Jury present at 3:15 p.m.)

THE COURT: So how you doing? You holding up? Okay, did you eat all that candy yet?

THE JURY: (Indiscernible).

THE COURT: All right. Okay. Next witness, the government's next witness.

MR. SCHRODER: Your Honor, the government calls Officer Steve Lee.

THE COURT: Okay. Sir, just make your way towards that blue chair, and then we'll swear you in and go from there. You probably can't see the blue chair. The chair up here. Okay.

OFFICER LEE: Yes, sir.

THE COURT: All right.

**STEPHEN R. LEE, PLAINTIFF'S WITNESS, SWORN**

THE CLERK: Thank you. You may be seated. For the record, could you please state your full name, spelling your last?

THE WITNESS: Yes, my name is Stephen, S-t-e-p-h-e-n, R. Lee, L-e-e.

THE CLERK: And your city and state of residence?

THE WITNESS: I currently reside in Barrow, Alaska.

THE CLERK: Thank you.

* * *

**U.S. District Court**

**District of Alaska**

**Notice of Electronic Filing**

The following transaction was entered on 7/8/2008 at 2:58 PM ADT and filed on 7/8/2008

**Case Name:** USA v. Donovan
**Case Number:** 4:08-cr-2
**Filer:**
**Document Number:** 81(No document attached)

**Docket Text:**
**MINUTE ORDER: Before the Court, at Docket [42], is Defendant with a Motion to Suppress. This matter has been fully briefed and was the subject of a Recommendation at Docket [63] and Final Recommendation at Docket [80] by the Magistrate Judge. After reviewing all relevant pleadings, the Court hereby ACCEPTS and ADOPTS the Magistrate Judge's recommendations and hereby DENIES Defendant's Motion to Suppress.(JPS, COURT STAFF)**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

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| UNITED STATES OF AMERICA<br>Plaintiff,<br>vs.<br>JERRY LEE DONOVAN,<br>Defendant. | 4:08-cr-002-RRB-JDR<br>**FINAL RECOMMENDATION REGARDING MOTION TO SUPPRESS**<br>(Filed Jul. 8, 2008)<br>(Docket No. 42) |

Defendant **Jerry Lee Donovan** has timely filed objections to the recommendation regarding his motion to suppress evidence on grounds that jurisdiction over the evidence remains solely in the State of Alaska courts. Docket No. 68. The government filed a response. Docket No. 70. Upon due consideration of these pleadings the magistrate judge continues to recommend that the motion to suppress be denied. A few comments on the objections follows.

Donovan argues that the federal court must defer to the Alaska State court in this case as to what to do with evidence seized pursuant to the Alaska State search warrant. The federal case law neither supports that view nor are Donovan's arguments convincing.

The federal Drug Enforcement Agency (DEA) obtained the seized evidence without a warrant or court order. Apparently none was requested by the State law enforcement officers who maintained

possession of the seized items. The seized methamphetamine was sent to the DEA lab when the State crime lab was unable to analyze the purity of methamphetamine. In a federal prosecution the government often charges a methamphetamine case based on the amount of actual meth which depends upon its purity. There was no State court proceedings pending at the time.

Donovan argues that because the property was seized under a State search warrant, *Johnson v. Johnson,* 849 P.2d 1361 (Alaska 1993) is directly on point holding that jurisdiction over the seized items remains in the Alaska state courts. Cases such as *Johnson* addressing a court's control over a *res* when that is necessary to the court's jurisdiction are not directly on point. *Johnson,* which is a forfeiture case is not determinative. *Johnson,* does not address what happens to the seized property that initially came within the jurisdiction of the state courts once the state case is over. The issue presented in this motion is not governed by state law and this court perceives no need to certify the issue to the Alaska Supreme Court as suggested by Donovan.

Donovan argues that he will be denied due process if he cannot "voice his position" before the state court. Failure to comply with state law does not mean that Donovan's federal due process rights under the United States Constitution have been violated. "A violation of state law . . . is not a denial of due process, even if the state law confers a procedural right." *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir.

1993). The standard of due process is a federal one. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487 (1985). Fundamental due process requires that persons not be deprived of property without due process of law. Donovan's due process rights concern the disposition of the property rather than the adoption of the seizure by one sovereign after actual seizure by another. In the instant prosecution Donovan will have an opportunity for a hearing prior to any permanent deprivation of his property interests. See *Logan v. Zimmerman Brush Co*, 455 U.S. 422, 102 S. Ct. 1148 (1982). The transfer of Donovan's property from the state court to the federal agency even if not authorized by state law did not permanently deprive him of his property interest.

Under the statutory scheme cited in the recommendation he is not entitled to the return of the guns and drugs because of the pending federal prosecution. Donovan's due process rights are protected in this federal prosecution wherein the United States seeks to prove beyond a reasonable doubt that he is guilty of the crime charged rendering the property subject to forfeiture. The federal indictment represents probable cause by a federal grand jury that Donovan has probably committed the crime charged thereby subjecting the firearms to forfeiture if he is convicted of the requisite criminal charge.

The evidence seized by law enforcement officers from 1314 Kongek Street in Barrow is not rendered inadmissible in the federal prosecution based on its

acquisition from the state law enforcement officers without a state court transfer order as argued by Donovan. State law does not control the admissibility of the subject evidence in a federal criminal prosecution. Any violation of Alaska state law by state law enforcement officers acting in the transfer of evidence from state to federal officers does not under the facts of this case require dismissal of the federal criminal charges.

It is not unusual for a state and federal government to have concurrent jurisdiction over a particular crime particularly in the area of controlled substances, This prosecution by the federal government does not unlawfully "muscle in" on state authorities as argued by Donovan. Nor does it destroy the constitutional relationship between State and federal courts as could occur if the state court were exercising its jurisdiction over the *res* in an in rem seizure of a controlled substance. Evidence seized in compliance with federal law is admissible without regard to state law. *United States v. Chavez-Vernaza,* 844 F.2d 1368, 1374 (9th Cir. 1987), as amended on denial of rehearing and rehearing en banc (1988). Thus, Donovan is not entitled to the opportunity to establish that the seizure of the evidence violated state law. *Id.*

Wherefore, the objections to the motion to suppress lack merit. The Motion to Suppress at Docket No. 42 should be denied. The motion shall now be forwarded to the assigned district judge for his determination.

DATED this 8th day of July, 2008, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate
Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

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| UNITED STATES OF AMERICA<br>Plaintiff,<br>vs.<br>JERRY LEE DONOVAN,<br>Defendant. | 4:08-cr-002-RRB-JDR<br>**RECOMMENDATION REGARDING MOTION TO SUPPRESS**<br>(Filed Jun. 24, 2008)<br>(Docket No. 42) |

Defendant **Jerry Lee Donovan** moves to suppress all evidence seized pursuant to an Alaska State Court search warrant on grounds that jurisdiction over that evidence lies solely in the State of Alaska courts. Docket No. 42.[1] The motion is opposed by the government. Docket No. 48.

## Factual Background

On December 8, 2004 the District Court for the State of Alaska issued search warrant No. 2BA-04-50-SW for the person of Mr. Jerry Donovan and the address of 1314 Kongek Street in Barrow, Alaska. The warrant was executed and a receipt of inventory of property seized was filed with the State District Court in Barrow, Alaska. The State of Alaska filed a

[1] This motion to suppress was originally part of Docket No. 29 and re-filed as a separate motion at Docket No. 42.

criminal complaint on December 9, 2004 charging Donovan with one count of misconduct involving a controlled substance and two counts of misconduct involving weapons. On December 20, 2004 a State Assistant District Attorney notified the state court that the state was not intending to proceed with its case against Mr. Donovan. Thereafter, the complaint was dismissed by the Barrow Court. The methamphetamine seized by the North Slope Borough Police Department on December 8, 2005 from the residence of Jerry Donovan was sent to the State Crime Lab but that lab was unable to analyze the methamphetamine. On August 18, 2005, Special Agent Michael Feran, DEA, obtained the exhibits (drugs) from the State laboratory and processed them as evidence, sending the exhibits to the DEA Western Regional Laboratory for analysis. *See* Exhibits attached to Donovan's Motion to Suppress filed at Docket No. 29. He also obtained possession of the weapons that formed federal weapons charge in this case.

**Analysis**

Donovan does not argue that the DEA's seizure of the evidence from the State Laboratory violated federal constitutional law. The Ninth Circuit has recognized that State law may be more restrictive in its federal counterpart. Because the instant case is a prosecution brought in federal court for violating the federal criminal law, federal law controls the admissibility of the evidence. *See United States v.*

*Bynum*, 362 F.3d 574, 582 (9th Cir. 2004), citing *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987).

Donovan relies upon *In Re Seizure of Approximately 28 Grams of Marijuana*, 278 F. Supp. 2d 1097 (N.D. CA., 2003). The federal district court in California held that it lacked jurisdiction to issue a seizure warrant for marijuana and to decide the arrestee's motion for the return of the marijuana because the court lacked federal subject matter jurisdiction. There, the state court had issued an order for return of the claimant's property including the marijuana. In that action the suit was brought *in rem* or quasi *in rem* and the control of the *res* was essential to the state court's jurisdiction. The state superior court exercised interim jurisdiction by holding the marijuana as evidence during a criminal trial. Thus, the issuance of a seizure warrant by the federal court was void as the marijuana was already under the *in rem* jurisdiction of another court. *Id.* at 1101. In its published opinion the U.S. District Court for the Northern District of California noted that even in the absence of a state forfeiture action, some courts have found that the principles articulated in *Penn Gen. Casualty Co. v. Pennsylvania Ex Rel Schnader*, 294 U.S. 189, 195 (1935) bar federal *in rem* proceedings against property seized by police pursuant to state court warrants. Courts applying *Penn General* in that context have done so based on state statutes which place items seized by local law enforcement under state judicial control resulting in

a seizure by the police itself as an assertion of jurisdiction over the seized items by the state courts.

*In Re Seizure of Aprox. 28 Grams of Marijuana* cites *Johnson v. Johnson*, 849 P.2d 1361, 1364 (Alaska, 1993) for its holding that a state search warrant conferred jurisdiction over seized currency to the exclusion of federal jurisdiction under a statute requiring a peace officer to bring all ceased property before the judge. The federal court in California also cited a line of cases allowing federal forfeiture actions to proceed against property seized by police officers so long as no state court forfeiture action was pending. As examples the District Court cited *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 44-45 (1st Cir. 1991); *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995) and *United States v. $639,470.00 U.S. Currency*, 919 F.Supp. 1405 (C.D. CA. 1996).

In *$639,470.00 U.S. Currency* a civil *in rem* forfeiture action was brought by the United States against a vehicle and an amount of U.S. Currency. No California state agency had initiated any forfeiture proceeding with regard to either the currency or the vehicle. Instead, the state BNE requested that the federal government "adopt" the seizure of the defendants and commence federal forfeiture proceedings. The California District Court denied the claimant's motion to dismiss for lack of jurisdiction noting that comity concerns were absent because the state had presented the *res* to the federal government for adoption and there was no state court proceeding to interfere with. The court also denied the claimant's

claim that jurisdiction over the defendants attached even though[ ] no forfeiture action was ever filed based on the argument that the seizure of the *res* by state law enforcement personnel brought the *res* under the jurisdiction of the state court. The California District Court found no provisions under the California code standing for the proposition that state seizure automatically creates state court in rem jurisdiction. 919 F. Supp. at 1410. That court also observed that the vesting in the state of rights to the property was not the same thing as the creation of jurisdiction in the state court over the property.

**The Johnson Case**

Donovan cites *Johnson v. Johnson*, 849 P.2d 1361, 1364 (Alaska 1993) arguing that property seized under a search warrant issued by the State of Alaska courts is exclusively within the jurisdiction of the Alaska State Courts. In *Johnson*, the property owner brought a conversion claim against the city which seized property and transferred it to the Drug Enforcement Administration (DEA). Fairbanks police officers had seized drugs, drug paraphernalia, weapons and cash upon executing a search warrant to search Johnson's house. The police transferred the money to DEA which administratively forfeited the money and returned a portion to the Fairbanks Police Department. In Johnson's criminal case the Superior Court suppressed all the evidence and ordered the state to return "any currency or its equivalency seized from the defendant and in the possession of the

State." The money was not returned. Johnson filed an action in the state court and the Superior Court granted the City's summary judgment motion determining that DEA's "adoptive seizure" had deprived Johnson of his title to the money.

The Alaska Supreme Court reversed, declaring the federal forfeiture void because the City's transfer of the money violated the state law regarding the disposition of property held in connection with a criminal proceeding. The Alaska Supreme Court ruled the City had violated Alaska Statute 12.36.020 which authorizes a law enforcement agency to return property to the owner if, (1) the property is not in custody in connection with . . . a criminal proceeding . . . ; and (2) the property in custody is not subject to forfeiture under the laws of the state. The Supreme Court reasoned that at the time of the transfer, the money was in custody of the court in connection with a criminal proceeding and the state could only transfer seized property to the DEA after it had completed forfeiture proceedings. The Alaska Supreme Court concluded that the state court had jurisdiction over the money "to the exclusion" of the DEA as a result of the search warrant.

Under AS 12.35.025 a peace officer is directed to bring the property before the magistrate within ten days. This statute enables the state court to exercise jurisdiction over the property seized pursuant to it. Thus, the money was never out of the legal control of the state court at the time it was turned over to the DEA.

Pursuant to the Supreme Court of Alaska decision, the City of Fairbanks refunded the seized amount of cash (plus interest) to Johnson. It was then seized by the DEA. Johnson tried to make the same claim in federal court that he had made in state court namely that the state had turned over property to the federal government without complying with State forfeiture law. The United States District Court (Judge James K. Singleton) granted summary judgment for the government and the claimant appealed. The Ninth Circuit Court of Appeals held that the check was "traceable" to drug transactions, and was thus forfeitable. *United States v. Check No. 25128 in Amount of $58,654.11*, 122 F.3d 1263, 1265 (9th Cir. 1997). In so deciding the court stated that the State of Alaska turned over nothing to the DEA. The DEA had seized the check by its own authority under a federal warrant issued pursuant to 21 U.S.C. § 881. *Id.*

Chapter 36 of Title 12 of the Alaska Statutes addresses the topic of disposition of recovered or seized property. That chapter directs that when property not belonging to a law enforcement agency comes into their custody the property shall be disposed of in accordance with Chapter 36. Alaska Statute 12.36.020(a) provides in pertinent part as follows: "A law enforcement agency may (1) not return property in its custody to the owner or the agent of the owner if (A) the property is in custody in connection with . . . a criminal proceeding or an official investigation of a crime; or (B) the property in custody is subject to forfeiture under the laws of the

. . . (ii) United States, and the United States has commenced forfeiture proceedings against the property or has requested the transfer of the property for the commencement of forfeiture proceedings. . . ." This section was rewritten by the 1996 Amendment which occurred after the Alaska Supreme Court's decision in *Johnson v. Johnson, supra*. The district court for the Northern District of California in *In Re Seizure of 28 Grams of Marijuana* did not cite *United States v. Check No. 25128 in the amount of $58,654.11, supra*.

AS 12.36.020(a)(2) provides that a law enforcement agency may "with the approval of the court, transfer the property to . . . federal law enforcement agency for forfeiture proceedings by that agency" and "the court having jurisdiction shall grant the approval . . . if the property (A) will be retained within the jurisdiction of the court by the agency to which the property is being transferred[.]" Although this statute provides that a state court order is required for the disposition of the property the law enforcement agency may not return the property to the claimant or his agent where the property is subject to forfeiture under the federal law. It further provides that the state court having jurisdiction of the property shall grant the approval of the transfer of the property to a federal law enforcement agency if the property will be retained within the jurisdiction of a court (of competent jurisdiction to rule of its forfeiture).

In the instant case the United States seeks forfeiture of the firearms pursuant to 21 U.S.C. § 853(a)(1) and § 853(a)(2) as a result of the commission of the alleged offenses in Count 1 of the federal indictment. Thus, the Alaska State law addressing the disposition of property does not create state court jurisdiction over it requiring a prior state court order as a prerequisite to federal in rem jurisdiction over the property sought to be forfeited in the instant action. Wherefore the evidence seized by law enforcement officers from 1314 Kongek Street in Barrow is admissible in this federal prosecution and Donovan's motion to suppress at Docket No. 42 lacks merit. The motion to suppress evidence at Docket No. 42 should be denied. IT IS SO RECOMMENDED.

DATED this 24th day of June, 2008, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

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Pursuant to D.Ak.L.M.R. 6(a), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than **NOON, Monday, June 30, 2008.** Failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. *McCall v. Andrus*, 628 F.2d 1185, 1187-1189

(9th Cir.), *cert. denied*, 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **Monday, July 7, 2008.** The parties shall otherwise comply with provisions of D.Ak.L.M.R. 6(a).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. *See Hilliard v. Kincheloe*, 796 F.2d 308 (9th Cir. 1986).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>JERRY LEE DONOVAN,<br>Defendant-Appellant. | No. 09-30003<br>D.C. No. 4:08-cr-00002-RRB-1<br>District of Alaska, Fairbanks<br>ORDER<br>(Filed Mar. 25, 2010) |

Before: KLEINFELD and TALLMAN, Circuit Judges, and SETTLE,* District Judge.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.